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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
PONDEROSA DRILLING AND  
DEVELOPMENT INC.,

Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-212

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

THIS MATTER, the appeal of compliance order DE 85-673 relative to repair of a drilled well, came on for hearing before the Board on January 29, 1986 at Spokane, Washington in the afternoon. Seated for and as the Board were; Wick Dufford, Lawrence Faulk, and Gayle Rothrock(presiding). In accordance with opportunities stated in the Board's rule, respondent WDOE elected a formal hearing. Denise Micka, court reporter, officially reported the proceedings.

Prior to the commencement of the evidentiary hearing the respondent alerted the Board to the cancellation of a WDOE docket

1 order, which action made moot PCHB 85-245. PCHB 85-245 had been  
2 consolidated for hearing with the instant appeal. The Board granted  
3 respondent's request to simply dismiss PCHB 85-245 (see separate  
4 order).

5 Appellant was represented by its president, W. Scott Barratt.  
6 Respondent agency was represented by Assistant Attorney General, Aller  
7 T. Miller.

8 Witnesses were sworn and testified. Exhibits were admitted and  
9 examined. Argument was heard. From the testimony, evidence and  
10 contentions of the parties, the Board makes these

#### 11 FINDINGS OF FACT

##### 12 I

13 Appellant company is a water well drilling contractor which  
14 performs the construction and maintenance of water wells for  
15 compensation. The company is based in Spokane and does work in  
16 several counties in eastern Washington.

##### 17 II

18 The Washington State Department of Ecology(WDOE) is an  
19 environmental management and regulatory agency empowered to license  
20 well drillers and monitor that industry under authority of Chapter  
21 18.104 RCW and Chapter 173-160 WAC.

##### 22 III

23 In July 1982 Ponderosa Drilling and Development Inc. constructed a  
24 testing well for C.F. Industries(CFI) of Ritzville, Washington. This  
25 well is located within the NW1/4NW1/4 of Sec. 24, T. 20 N., Range 36

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1 E.W.M. At the time drilling was completed, the well was 376 feet in  
2 depth with a static water level of 220 feet below land surface.

3 IV

4 CFI had oral approval from WDOE's Eastern Regional Office to cause  
5 this testing well to be constructed. CFI wished to ascertain the  
6 integrity and the capacity of two nearby ammonia storage tanks through  
7 filling them first with ground water, then emptying them. CFI  
8 contracted with Ponderosa Drilling at a negotiated price, to actually  
9 construct such a temporary well and, upon completion of the well, CFI  
10 ran the storage tank test.

11 V

12 In February of 1985 officials of the Department of Ecology  
13 investigated a nearby production well on the property, and then  
14 investigated the test well, and discovered cascading water in both  
15 wells. This phenomenon results in the transfer of ground water  
16 between aquifers, and can be cause for alarm when there are, as here,  
17 many shallow wells in the area which could be inadvertently drained  
18 and made disabled for stockwatering and domestic purposes.

19 The WDOE official made the determination about cascading water in  
20 the test well (now called the fire protection well) by listening with  
21 his ear. His hearing is trained to ascertain that particular sound.  
22 An electronic probe lowered into the well also gave an indication of  
23 cascading water. Photographic equipment could not be successfully  
24 lowered into the well to provide other verification. Appellant now  
25 questions whether cascading is actually occurring in the fire

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1 protection well.

2 VI

3 In the nearby production well, cascading was initially detected by  
4 the same methods (hearing and electronic probe). As to this well,  
5 appellant readily agreed that cascading was occurring and confirmed  
6 that this was, in fact, the case upon commencing to fix the problem.  
7 The repair efforts were successful, and subsequent inspection of the  
8 well hole by camera revealed that the cascading had been stopped.

9 However, CFI refused to pay for any part of this well repair work.

10 VII

11 WDOE's investigation of the well construction problem at issue  
12 involved review of the various logs filed to show the kinds of  
13 conditions encountered when the fire protection well and others nearby  
14 were drilled.

15 The log for the fire protection well showed that the driller  
16 passed through water bearing zones before halting at 376 feet. The  
17 uppermost of these zones was at about the depth where cascading was  
18 detected by the electronic probe. This same depth zone correlates  
19 with the range of static levels in the adjacent domestic well. This  
20 domestic well, built after the fire protection and production wells,  
21 shows a marked decline in static level over the past several years.

22 VIII

23 We find that water is cascading in the fire protection well and  
24 that the well logs, prepared by the driller, show that the occurrence  
25 of this condition could reasonably have been anticipated when the well

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1 was first constructed.

2 We find further, that no action was taken to protect against  
3 cascading water when the fire protection well was drilled and that the  
4 condition has remained uncorrected.

5 IX

6 On April 24, 1985 WDOE sent a letter to Ponderosa indicating well  
7 construction problems in the fire protection well. The letter also  
8 requested the drilling company to show cause why a regulatory order  
9 should not be issued by WDOE requiring that the well be repaired to  
10 comply with WAC 173-160-110. Ponderosa responded with a proposal  
11 (K-packing) to eliminate the transfer of ground water between aquifers  
12 which WDOE did not find satisfactory.

13 X

14 In May of 1985 the Department suggested that Ponderosa repair the  
15 well using the more expensive casing and sealing method it  
16 successfully used on the nearby production well. After C.F.  
17 Industries refused to pay for this work, Ponderosa declined to correct  
18 the problem. Thereafter, the Department issued Order No. DE 85-673 on  
19 September 16, 1985 which explicitly required that Ponderosa repair the  
20 well in accordance with the Minimum Standards for construction and  
21 maintenance of water wells, WAC 173-160-110.

22 XI

23 Appellant company, feeling aggrieved at being the sole named  
24 recipient of the order, appealed to the Board on October 21, 1985 for  
25 relief. The matter became our cause number PCHB 85-212.

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1 XII

2 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
3 adopted as such.

4 From these Findings of Fact the Board comes to these

5 CONCLUSIONS OF LAW

6 I

7 The Board has jurisdiction over these persons and this matter.  
8 Chapters 18.104 and 43.21B RCW.

9 II

10 Under terms of RCW 18.104.040 WDOE has certain powers and duties,  
11 among which are;

12 (2) To enter upon lands for the purpose of  
13 inspecting any water well, drilled or being  
drilled, at all reasonable times;

14 (3) To call upon or receive professional or  
15 technical advice from any public agency or any  
person;

16 (4) To make such rules and regulations  
governing licensing hereunder and water well  
17 construction as may be appropriate to carry out the  
purposes of this chapter. Without limiting the  
18 generality of the foregoing, the department may in  
cooperation with the department of social and  
health services make rules and regulations  
19 regarding:

20 (a) Standards for the construction and  
maintenance of water wells and their casings;

21 (b) Methods of sealing artesian wells and  
water wells to be abandoned or which may  
contaminate other water resources;

22 (c) Methods of artificial recharge of ground  
water bodies and of construction of wells which  
23 insure separation of individual water bearing  
formations;

24 In applying these powers in this case, WDOE made a reasonable  
25 determination that water was cascading from one water-bearing zone to

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1 another in the subject well. WDOE determined it must be repaired to  
2 meet standards as soon as possible to avoid resource damage and  
3 wastage and to avoid interference with others' beneficial use of area  
4 groundwater found in the upper aquifer(s).

5 III

6 Firm authority for the issuance of a cease and desist order (DE  
7 85-673) in this matter is found in the same statute.

8 RCW 18.104.060 provides, in pertinent part

9 Notwithstanding and in addition to any other powers  
10 granted to the Department, whenever it appears to  
11 the director, . . . that a person is violating or  
12 is about to violate any of the provisions of this  
13 chapter, the director, . . . may cause a written  
14 regulatory order to be served upon said person . .  
15 . The order shall specify the provision of this  
16 chapter and if applicable, the rule or regulation  
17 adopted pursuant to this chapter alleged to be or  
18 about to be violated . . . and shall order the act  
19 constituting the violation . . . to cease and  
20 desist or, in appropriate cases, shall order  
21 necessary corrective action to be taken with regard  
22 to such acts within a specific and reasonable  
23 time. . . . (Emphasis added).

24 IV

25 DOE's regulatory Order (No. DE 85-673) specified that WAC  
26 173-160-110 was being violated. That section reads:

27 In developing, redeveloping or conditioning a  
well, care shall be taken to preserve the  
natural barriers to ground water movement  
between aquifers and to seal aquifers or  
strata penetrated during drilling operations  
which might impair water quality or result in  
cascading water. All sealing should be  
permanent and shall prevent possible downward  
movement of surface waters in the annular  
space around the well casing. Sealing shall  
also be accomplished to prevent the upward

1 movement of artesian waters within the annular  
2 space around the well casing that could result  
3 in the waste of ground water. The sealing  
4 shall also restrict the movement of ground  
5 water either upward or downward from zones  
6 that have been cased out of the well because  
7 of poor quality. When cement grout is used in  
8 sealing, it shall be set in place 72 hours  
9 before additional drilling takes place, unless  
10 special additives are mixed with the grout  
11 that will cause it to adequately set in a  
12 shorter period of time. All grouting shall be  
performed by adding the mixture from the  
bottom of the space to be grouted toward the  
surface in one continuous operation. The  
minimum grout thickness shall be one inch.

When casing diameter is reduced, a  
minimum of 8 feet of overlap shall be required  
and the bottom of the annular space between  
the casings shall be sealed with suitable  
packer; the remainder of the annular space  
will be pressure grouted with bentonite or  
neat cement. (Emphasis added).

#### 13 V

14 We conclude that upon initial drilling, Ponderosa knew or should  
15 have known that the occurrence of cascading water in the fire  
16 protection well was a substantial likelihood. Under, these  
17 circumstances, the appellant violated WAC 173-160-110 by failing to  
18 observe the standard of care required.

19 Accordingly, the issuance of the regulatory order at issue was  
20 proper and should be upheld.

#### 21 VI

22 Appellant argues that the responsibility for any cascading water  
23 problems should be born by both it and by CFI, the land owner.  
24 Attention is drawn to WAC 173-160-020. This section provides, in part:

25 It is the responsibility of the water well

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1 contractor and the property owner to take  
2 whatever neasures are necessary to guard  
3 against waste and contamination of the  
4 ground-water resources.

#### 5 VII

6 The -case we have rests on an allegation of violation of WAC  
7 173-160-110. That section is clearly addressed to well construction  
8 contractors. It was violated by Ponderosa.

9 In the exercise of its prosecutorial discretion, the WDOE did not  
10 choose to issue an order to CFI under WAC 173-160-020. We do not read  
11 the regulation as obliging it to do so.

12 The problem here is the result of the contractor's action or  
13 inaction. Whether the landowner might be vicariously liable is not an  
14 issue before us.

15 Further, the regulations do not address the practical problem of  
16 who (as between landowner and driller) pays for what, when problems of  
17 well construction arise. That is the sort of thing which should be  
18 addressed by the contract between the private entities.

#### 19 VIII

20 Any Finding of Fact which deemed a Conclusion of Law is hereby  
21 adopted as such.

22 From these Conclusions of Law the Board enters this

ORDER

DE 85-673 is affirmed.

DONE this 7th day of March, 1986.

POLLUTION CONTROL HEARINGS BOARD

  
GAYLE ROTHROCK, Vice-Chairman

  
WICK DUFFORD, Lawyer Member

See Dissenting Opinion  
LAWRENCE J. FAULK, Chairman

1 LAWRENCE J. FAULK--DISSENTING OPINION

2 I write separately because I believe the result reached by the  
3 majority is unreasonable, unjust to this citizen, establishes a  
4 precedent that is impractical and certainly not required by the law.

5 In this case we have a well driller being ordered by the  
6 Department of Ecology to correct a well three and one-half years after  
7 it was drilled. The evidence indicates that in 1982, the appellant  
8 contracted with C.F. Industries to construct two wells at their  
9 Ritzville, Washington plant. One was apparently a permanent well and  
10 one was a temporary well. The temporary well was completed on July 8,  
11 1982 and the well log submitted to the Department of Ecology. It was  
12 referred to by the department in this hearing but was not offered into  
13 evidence.

14 Sometime between 1982 and 1985, cascading water was discovered by  
15 the Department of Ecology in the permanent well. The method of  
16 discovery was the use of a camera lowered into the well. This was  
17 brought to the attention of the appellant, who promptly corrected the  
18 well at a cost of approximately \$5,400. He never was paid by C.F.  
19 Industries for this corrective action on the permanent well.

20 In February, 1985, the Department of Ecology visited the property  
21 of C.F. Industries on another matter and happened to inspect the  
22 temporary well. They believed that water was cascading even though  
23 their well camera was not useable because a pump prevented the camera  
24 from being lowered into the well. Cascading water results in water  
25 being transferred between aquifers.

26 DISSENTING OPINION  
27 PCHB No. 85-212

1 The Department subsequently issued an order requiring the  
2 appellant to repair the temporary well.

3 The question this Board needs to answer is: "Is it reasonable to  
4 require a well driller to repair a well almost four years after it was  
5 constructed without being compensated by the owner?"

6 RCW 18.104.060 entitled "Violations - Cease and Desist Orders" in  
7 pertinent part reads as follows:

8 Notwithstanding and in addition to any other  
9 powers granted to the Department, whenever it  
10 appears to the director, . . . that a person  
11 is violating or is about to violate any of the  
12 provisions of this chapter, the director, ...  
13 may cause a written regulatory order to be  
14 served upon said person . . . The order shall  
15 specify the provision of this chapter and if  
16 applicable, the rule or regulation adopted  
17 pursuant to this chapter alleged to be or  
18 about to be violated . . . and shall order the  
19 act constituting the violation . . . to cease  
20 and desist or, in appropriate cases, shall  
21 order necessary corrective action to be taken  
22 with regard to such acts within a specific and  
23 reasonable time. . . . (Emphasis added).

24 This statute indicates to me that DOE must act "within a specific  
25 and reasonable time." In my view asking someone to correct a well  
26 almost four years after the well was drilled does not meet that  
27 criteria.

28 Now we must determine who is responsible to correct the well  
29 giving the DOE the benefit of doubt and deciding there is in fact  
30 cascading water. In order to answer that question one must look to  
31 the Washington Administrative Code. WAC 173-160-020 entitled  
32 "General" in pertinent part reads as follows:

33 DISSENTING OPINION  
34 PCHB No. 85-212

1           The following general standards shall apply to  
2           all water wells constructed in the state of  
3           Washington. These standards are minimum  
4           standards which must be adhered to in the  
5           construction of all wells. It is the  
6           responsibility of the water well contractor  
7           and the property owner to take whatever  
8           measures are necessary to guard against waste  
9           and contamination of the ground water  
10           resources. (Emphasis added).

11           This very clearly says that it is the responsibility of the  
12           property owner and well driller to "take whatever measures are  
13           necessary to guard against waste and contamination of the ground water  
14           resources." DOE has a responsibility to communicate clearly to the  
15           property owner and the well driller the standards that must be  
16           followed. That was not done in this case because communication  
17           between the owner and the Department was verbal and the essence of  
18           that discussion was never entered into evidence. For the Department  
19           to come back almost four years later and require the driller to repair  
20           the well, at his own expense, seems to me to be the height of  
21           bureaucratic intransigence.

22           The Legislature will be disappointed to learn that in enacting the  
23           well drillers' act and subsequent amendments, it was allowing a  
24           government agency to force well drillers to repair wells any number of  
25           years after the well was drilled. And at their own expense while the  
26           property owner bears no responsibility. And I think its  
27           disappointment will continue unabated when it discovers that the  
28           majority of this Board has upheld that philosophy.

29           Finally, one has to ask what is the result of this decision. In

1 my view, this Board has given a license to the Department of Ecology  
2 to order well drillers to repair wells any number of years after the  
3 well was drilled without assigning some responsibility for the  
4 property owner to pay for improperly constructed wells. It doesn't  
5 make any sense to me.

6 The public interest would be better served if the duty to repair  
7 wells, where cascading water may be a problem, were assigned equally  
8 to the property owner and the well driller. As a practical matter,  
9 that is the only reasonable solution in this case.

10 In any event, it is our job to interpret and apply the statutes in  
11 a manner that furthers justice. I believe the greater justice is  
12 accomplished by finding for the appellant.

13 Therefore, I would vacate the subject order and reissue it to both  
14 C.F. Industries and the appellant if in fact the Department is certain  
15 cascading water exists in this temporary well.

16  
17  3/7/86  
18 LAWRENCE J. FAULK, Chairman  
19 POLLUTIONS CONTROL HEARINGS BOARD  
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26 DISSENTING OPINION  
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